TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1926

No. [redacted] 125

FRED T LEY & CO., INC., APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED MAY 25, 1926

(31,229)

(31,229)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 506

FRED T. LEY & CO., INC., APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 21, 1925

[fol. 1] **IN THE COURT OF CLAIMS**

No. C-932

FRED T. LEY & COMPANY, INC.,

v.

THE UNITED STATES

I. PETITION—Filed August 1, 1923

To the Honorable the Court of Claims:

The claimant, Fred T. Ley & Company, respectfully represents:

I. That it is a corporation organized under the laws of the Commonwealth of Massachusetts with its office and principal place of business in the city of Springfield.

II. On or about the 11th day of June, 1917, claimant was notified that it had been awarded the work of constructing the cantonment that was to be known as Camp Devens, Massachusetts, and thereafter, to wit, on or about June 29, 1917, it entered into formal written contract in the emergency form with the United States represented by Major W. A. Dempsey as contracting officer for the construction of the cantonment and buildings known as Camp Devens, Massachusetts. Copy of said contract is hereto annexed as Exhibit "A" and made a part hereof.

III. Immediately upon notification of award and at the request of the War Department or its agents and representatives, the claimant entered upon the work of construction and by the 19th day of [fol. 2] June, 1917, had upwards of 1,000 men engaged upon such work, which number was being rapidly increased every day. Under instructions and with the approval of the constructing quartermaster assigned to the work as the representative of the contracting officer, claimant took out policies of insurance with the Massachusetts Employees Insurance Association, a mutual concern, whose name was later changed to the Liberty Mutual Insurance Company. This insurance indemnified the claimant as agent of the United States for the performance of this work against liability to the public for personal injuries which might be sustained by the general public upon the work under the contract.

IV. The public interests were such as to require that the work of constructing Camp Devens be carried forward with the utmost haste and the emergent character of the work involved the sacrifice of all other considerations to that of speed. It was therefore necessary to do many things with less regard to safety of life and limb than would have been requisite under ordinary conditions. Claimant was obliged to employ many persons to assist in such work and a large

number of persons other than the employees of the claimant as agent for the United States were necessarily in and upon the military reservation at Camp Devens while this work was going on, and were thus subject to a greater or less degree to danger of injury by operations under the contract carried on under the circumstances aforesaid. Such injury to the general public would generally subject the contractor as agent for its principal to the payment of damages. The liquidation of the sums due thereon might have required many years of negotiation and litigation. In order that the financial relations between the contractor and the United States might be dis- [fol. 3] posed of promptly and not remain open until the settlement of all such questions, it was necessary that public liability insurance should be taken out whereby for payment of a fixed sum all such costs, expenses and charges would be assumed by the insurer. These were the reasons impelling the authority to claimant to take out such insurance policies, and the claimant in taking them out and incurring the expense therefor.

V. After the claimant had incurred its obligations to the Massachusetts Employees Insurance Association, later the Liberty Mutual Insurance Company aforesaid, objection was made in the Construction Division of the War Department having supervision of this work to the government paying such insurance costs on the ground that the government should itself assume the risks involved. Shortly thereafter, however, to wit, about the first of September, 1917, the Chief of Construction Division, who was then also the contracting officer, decided that public liability insurance was a proper service for the cantonment contractors to engage and that the cost thereof was a proper item of cost under the form of cantonment contract, including the contract had by claimant. On October 3, 1917, a letter was written by authority of the Secretary of War by Colonel I. W. Littell, Quartermaster Corps, U. S. A., then in charge of cantonment construction for the War Department, to the contracting officer in succession, Major W. A. Dempsey, instructing him to advise the Comptroller of the Treasury that the policy of liability insurance theretofore taken out by the contractor for the work of building cantonment at Camp Grant had been taken out by the contractor with the approval of the constructing quartermaster, acting upon the instructions of the officer in charge of cantonment construction in the [fol. 4] office of the Quartermaster General of the Army, and submit to the Comptroller the question of whether such premium could be reimbursed. Failing to obtain a decision by the Comptroller by that course, the contracting officer thereafter made a certificate in the substantial identical case of Mason & Hanger Company under an exactly similar contract for construction of Camp Zachary Taylor approving the action of that contractor of taking out policies of public liability insurance and authorizing the Quartermaster to reimburse said company for the cost of premiums paid thereon. The constructing quartermaster submitted to the Comptroller the question of his right to reimburse Mason & Hanger the cost of such premiums and the Comptroller decided that such approval was not sufficient to

permit payment. The action so taken by the contracting officer in that case was intended to open the way to payment of all similar costs under other and similar cantonment contracts, but in consequence of said decision of the Comptroller, the Chief of the Construction Division of the War Department thereafter refused to issue like certificates in other cases, including the case of claimant under the Camp Devens contract. Claimant alleges that its action in taking out the liability insurance in the first instance was with the approval of the constructing quartermaster acting for the contracting officer and that the costs reasonably and necessarily incurred by it on account of such insurance were in effect ratified and approved by the contracting officer after their incurrence as a proper and legitimate cost of the work done under the Camp Devens contract. But for the action of the Comptroller in declining to sanction payment of such expense, the contracting officer would have formally approved and paid such costs.

[fol. 5] VI. The amount of premiums paid by claimant for public liability insurance, exclusive of dividend returns, amounted to $10,190.15, which was reasonable and just and no part of which has been reimbursed to the claimant. This expense was reasonable and necessarily incurred under and on account of the work done in constructing the cantonment known as Camp Devens. By reason of the facts aforesaid and under Article II, sub-paragraph (h), a claim has accrued to the claimant against the United States for reimbursement of the full sum paid by it as costs of necessary liability insurance. Article II, subparagraph (h) of the contract referred to is as follows:

"(h) Such bonds, fire, liability and other insurance as the Contracting Officer may approve or require; and such losses and expenses, not compensated by insurance or otherwise, as are found and certified by the Contracting Officer to have been actually sustained (including settlements made with the written consent and approval of the Contracting Officer) by the Contractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the Contractor. Such losses and expenses shall not be included in the cost of the work for the purpose of determining the Contractor's fee. The cost of reconstructing and replacing any of the work destroyed or damaged shall be included in the cost of the work for the purpose of reimbursement to the Contractor, but not for the purpose of determining the Contractor's fee, except as hereinafter provided."

VII. A claim was presented to the board of contract adjustment representing the Secretary of War for reimbursement of the costs herein claimed, but such claim was disapproved on the ground that except with the sanction of the Comptroller General reimbursement of costs of this character could not be made by the War Department. [fol. 6] VIII. No other action has been had on said claim in Congress or by any of the departments; no person other than the claim-

ant is the owner thereof or interested therein; no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; the claimant has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government. The claimant is a citizen of the United States. And the claimant claims $10,190.15.

King & King, Attorneys for Claimant.

Sworn to by George R. Shields. Jurat omitted in printing.

[fol. 7] EXHIBIT "A" TO PETITION

[NOTE.—Parts of Exhibit "A" not printed because immaterial to any issue involved are as follows: Parts of Art. II; part of Art. III; all of Art. V; part of Art. VI; all of Arts. VII, VIII, X, XI, XII, and XIII, and Schedule of Rentals. Contract in full is on file with petition.]

Contract for Emergency Work

Construction of Cantonment at Ayer, Mass.

Contract made and concluded this 14th day of June, 1917, by and between Fred T. Ley & Company, of Springfield, Mass., a corporation organized under the laws of the State of Massachusetts, represented by Harold A. Ley, its president, party of the first part (hereinafter called Contractor), and the United States of America, by Major W. A. Dempsey, Q. M. U. S. R. (hereinafter called Contracting Officer), acting by authority of the Secretary of War, party of the second part.

Whereas, the Congress having declared by Joint Resolution approved April 6, 1917, that war exists between the United States of America and Germany, a national emergency exists and the United States urgently requires the immediate performance of the work hereinafter described, and it is necessary that said work shall be completed within the shortest possible time; and

[fol. 8] Whereas, it is advisable under the disturbed conditions which exist in the contracting industry throughout the country for the United States to depart from the usual procedure in the matter of letting contracts and adopt means that will insure the most expeditious results; and

Whereas, the Contractor has had experience in the execution of similar work, has an organization suitable for the performance of such work, and is ready to undertake the same upon the terms and conditions herein provided:

Now, therefore, this contract, witnesseth, That in consideration of the premises and of the payments to be made as hereinafter provided, the Contractor hereby covenants and agrees to and with the Contracting Officer as follows:

Article I

Extent of the Work.—The Contractor shall, in the shortest possible time, furnish the labor, material, tools, machinery, equipment, facilities, and supplies, and do all things necessary for the construction and completion of the following work:

At Ayer, Massachusetts

Buildings and other utilities, except roads, stoves, bunks, mattresses, ranges and refrigerators, for an infantry Division including the following additional units, viz:

1 Aero Squadron,
1 Balloon Company,
1 Telegraph Battalion, Signal Corps,
1 Regiment, Heavy Artillery, horse drawn,

in accordance with the drawings and specifications to be furnished by the Contracting Officer, and subject in every detail to his supervision, direction and instruction.

The Contracting Officer may, from time to time, by written instructions or drawings issued to the Contractor, make changes in said [fol. 9] drawings and specifications, issue additional instructions, require additional work, or direct the omission of work previously ordered, and the provisions of this contract shall apply to all such changes, modifications and additions with the same effect as if they were embodied in the original drawings and specifications. The Contractor shall comply with all such written instructions or drawings.

The title to all work completed or in course of construction shall be in the United States; and upon delivery at the site of the work, and upon inspection and acceptance in writing by the Contracting Officer, all machinery, equipment, hand tools, supplies and materials, for which the Contractor shall be entitled to be reimbursed under paragraph (a) of Article II hereof, shall become the property of the United States. These provisions as to title shall not operate to relieve the Contractor from any duties imposed hereby or by the Contracting Officer.

Article II

Cost of the Work.—The Contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the Contracting Officer and as are included in the following items:

* * * * * * *

(h) Such bonds, fire, liability and other insurance as the Contracting Officer may approve or require; and such losses and expenses, not compensated by insurance or otherwise, as are found and certified by the Contracting Officer to have been actually sustained (including settlements made with the written consent and approval of the Contracting Officer) by the Contractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the Contractor. Such losses and expenses shall not be included in the cost of the work for the purpose of determining the Contractor's fee. The cost of reconstructing and replacing any of the work destroyed or damaged shall be included [fol. 10] in the cost of the work for the purpose of reimbursement to the Contractor, but not for the purpose of determining the Contractor's fee, except as hereinafter provided.

* * * * * * *

(k) Such other items as should in the opinion of the Contracting Officer be included in the cost of the work. When such an item is allowed by the Contracting Officer it shall be specifically certified as being allowed under this paragraph.

* * * * * * *

Article III

Determination of Fee.—As full compensation for the services of the Contractor, including profit and all general overhead expense, except as herein specifically provided, the Contracting Officer shall pay to the Contractor in the manner hereinafter prescribed a fee to be determined at the time of completion of the work from the following schedule, except as hereinafter otherwise provided:

* * * * * * *

The total fee to the Contractor hereunder shall in no event exceed the sum of $250,000, anything in this agreement to the contrary notwithstanding.

Article IV

Payments.—On or about the seventh day of each month the Contracting Officer and the Contractor shall prepare a statement showing as completely as possible: (1) the cost of the work up to and including the last day of the previous month, (2) the cost of the materials furnished by the Contracting Officer up to and including such last day and (3) an amount equal to three and one-half per cent (3½%), except as herein otherwise provided, of the sum of (1) and (2) on account of the Contractor's fee; and the Contractor at such time shall deliver to the Contracting Officer original signed payrolls for labor, original invoices for materials purchased and all other original papers not theretofore de-

livered supporting expenditures claimed by the Contractor to be included in the cost of the work. If there be any item [fol. 11] or items entering into such statement, upon which the Contractor and the Contracting Officer can not agree, the decision of the Contracting Officer as to such disputed item or items shall govern. The Contracting Officer shall then pay to the Contractor on or about the ninth day of each month the cost of the work mentioned in (1) and the fee mentioned in (3) of such statement, less all previous payments. When the statement above mentioned includes any work of reconstructing and replacing work destroyed or damaged, the payment on account of the fee in (3) for such reconstruction and replacement work shall be computed at such rate, not exceeding three and one-half per cent (3½%), as the Contracting Officer may determine. The statement so made and all payments made thereon shall be final and binding upon both parties hereto, except as provided in Article XIV hereof. The Contracting Officer may also make payments at more frequent intervals for the purpose of enabling the Contractor to take advantage of discounts at intervals between the dates above mentioned of for other lawful purposes. Upon final completion of said work the Contracting Officer shall pay to the Contractor the unpaid balance of the cost of the work and of the fee as determined under Articles II and III hereof.

* * * * * * *

Article VI

Special Requirements.—The Contractor hereby agrees that it will:

* * * * * * *

(c) Procure, and thereafter maintain such insurance, in such forms and in such amounts, and for such periods of time as the Contracting Officer may approve or require.

* * * * * * *

Article IX

Bond.—The Contractor shall prior to commencing the said work furnish a bond, with sureties satisfactory to the Contracting Officer, [fol. 12] in the sum of Two Hundred Fifty Thousand Dollars ($250,000.00), conditioned upon its full and faithful performance of all the terms, conditions, and provisions of this contract, and upon its prompt payment of all bills for labor, material, or other service furnished to the Contractor.

* * * * * * *

Article XIV

Settlement of Disputes.—This contract shall be interpreted as a whole and the intent of the whole instrument, rather than the interpretation of any special clause, shall govern. If any doubts or disputes shall arise as to the meaning or interpretation of anything in this contract, or if the Contractor shall consider himself prejudiced by any decision of the Contracting Officer made under the provisions of Article IV hereof, the matter shall be referred to the Officer in Charge of Cantonment Construction for determination. If, however, the Contractor shall feel aggrieved by the decision of the Officer in Charge of Cantonment Construction, he shall have the right to submit the same to the Secretary of War whose decision shall be final and binding upon both parties hereto.

Article XV

This contract shall bind and inure to the Contractor and its successors.

It is understood and agreed that wherever the words "Contracting Officer" are used herein, the same shall be construed to include his successor in office, any other person to whom the duties of the Contracting Officer may be assigned by the Secretary of War and any duly appointed representative of the Contracting Officer.

Witness the hands of the parties hereto the day and year first above written, all in triplicate.

Fred T. Ley & Co., Inc., by Harold A. Ley, President.
United States of America, by W. A. Dempsey, Contracting Officer.

[fol. 13] II. General Traverse.—Entered Oct. 1, 1923

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

III. Argument and Submission

On April 14, 1925, this case was argued and submitted on merits by Mr. George A. King, for the plaintiff, and by Messrs. O. R. McGuire and John E. Hoover, for the defendant.

[fol. 14] **IV. Findings of Fact, Conclusion of Law and Memorandum by the Court**—Entered May 4, 1925

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT

I

Plaintiff is a corporation organized under the laws of the State of Massachusetts, with its principal office in the city of Springfield.

II

Under date of June 14, 1917, plaintiff entered into a contract with the United States, represented by Major W. A. Dempsey, Q. M., U. S. R., as contracting officer, covering the construction on a cost-plus basis of certain cantonment buildings at Camp Devens, near Ayer, Massachusetts. A copy of the material parts of said contract is annexed to the petition herein as exhibit "A" and is by reference made a part of this finding. The contract was identical in form and provisions, except as to the work to be done thereunder, with contracts made at or about the same time for fifteen other cantonments in other parts of the United States, one of these being the contract involved in the case of Mason and Hanger Company, 56 C. Cls. 238.

III

Major W. A. Dempsey was the contracting officer of the Government at and before the date of the contract and until July 27, 1917. He was then succeeded as such contracting officer by Colonel I. W. Littell, who remained as contracting officer until February 12, 1918, at which time he was in turn succeeded by Colonel R. C. Marshall, jr. (later brigadier general). Colonel Littell was also the officer in charge of cantonment construction up to the time he was relieved as contracting officer by General Marshall. The constructing quartermaster at Camp Devens was Captain Edward Canfield. Directly after entering upon the work plaintiff, in accordance with its usual practice, took out a policy of insurance covering public liability insurance and continued to carry same and paid premium costs thereof during the continuance of the work under [fol. 15] the contract. On June 23, 1917, the officer in charge of construction, in a communication to plaintiff, informed plaintiff that it should carry such insurance as the contracting officer might direct and that the Government would carry its own risk against fire and public liability damage. The contracting officer disapproved of the action of the contractor in taking out liability insurance and notified plaintiff that he did not consider the cost of such insurance a proper item in the cost of the work.

IV

On June 28, 1917, a telegram or night message was addressed by the contracting officer, Major Dempsey, to plaintiff and to each of the other fifteen contractors, notifying them to obtain insurance protecting their material against fire between the time of delivery by the carrier and acceptance by the Government, and also such workmen's compensation insurance as was required by the statutes, and further stating that other insurance risks were assumed by the Government and that the Government would not assume responsibility for losses and expenses resulting from the contractor's fault or neglect. Subsequent to this night message, and on July 5, 1917, plaintiff inquired of the constructing quartermaster whether or not the public liability insurance then in force should be canceled or whether such risk should be assumed by plaintiff. On July 9, 1917, the officer in charge of cantonment construction wrote to the constructing quartermaster at Camp Devens, calling his attention to the fact that the contract provided that insurance should be approved by the contracting officer and not by the constructing quartermaster.

V

On or about August 8, 1917, the constructing quartermaster sent the officer in charge of cantonment construction several policies which had been taken out by the plaintiff and which had been delivered to the constructing quartermaster, among which were the public liability insurance policies taken out by the plaintiff, as hereinbefore stated. These policies for public liability insurance were returned to the constructing quartermaster on or about August 10, 1917, disapproved on account of that form of insurance not being authorized, and this disapproval was communicated to the plaintiff on or about August 13, 1917. These policies ran from month to month and carried a clause authorizing the cancellation within a limited period stated. In their letter of July 25, 1917, transmitting policies, as above stated, to the constructing quartermaster, plaintiff gave a list of the insurance policies, two of which were for workmen's compensation liability, two for teams' liability damage, one for safe burglary, one for paymaster robbery, and two being policy CO-86, "expiring July 19, 1917," and policy CO-107, "expiring August 19, 1917," for public liability. These were the policies that were forwarded, as above stated, to the officer in charge of cantonment construction, and were returned on August 10 with the statement that they were not approved.

On August 24, 1917, plaintiff wrote the officer in charge of cantonment construction, expressing regret at the decision that public [fol. 16] liability insurance would not be authorized and urging that it be approved. The Government officers adhered to their decision, and on August 31, 1917, plaintiff wrote to the officer in charge of cantonment construction claiming that the first set of policies had been taken out and authorized by the constructing quartermaster, and

also added that the second set of policies expired on August 19, and were not renewed at the expense of the Government because of the orders received from the officer in charge of cantonment construction. In reply to this letter the officer in charge of cantonment construction on September 4, 1917, wrote to plaintiff, calling attention to the telegram of June 28, 1917, and stating that under the conditions mentioned in that telegram he could not understand why the policies for public liability and other insurance were not immediately canceled in spite of the claimed authorization by the constructing quartermaster. This letttr was responded to by the plaintiff on September 6 with the explanation of the alleged authorization by Captain Canfield and added: "We sincerely trust we will secure your approval to carry public liability insurance." A number of communications passed between the parties on the same general subject of public liability insurance, with the result that the contracting officer declined to approve the taking out of policies covering the same.

VI

The actual cost incurred and paid by the plaintiff on account of public liability insurance under the said contract from June 14, 1917, to December 31, 1917, including the liability insurance policies CO-86 and CO-107 and four other policies, amounted to $10,190.15, no part of which has been paid back to the plaintiff.

VII

The evidence fails to show that the public liability insurance taken out by the plaintiff was ever required, approved or ratified by the defendant's contracting officer or his successor in office or any other person to whom the duties of the contracting officer were assigned by the Secretary of War, or by any duly appointed representative of the contracting officer.

Conclusion of Law

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be entered by the clerk and collected by him according to law.

Memorandum

The plaintiff claims reimbursement of the cost of policies of public liability insurance which were carried for the protection against claims for injuries sustained by the public on the work done under a contract with the Government of June 14, 1917. This contract [fol. 17] was one of sixteen cantonment contracts of similar form

and requirements, except as to the work, and was a contract with similar provisions to that involved in the Mason and Hanger Company case, 56 C. Cls. 238. In the case just mentioned it was made definitely to appear that the taking out of public liability insurance had been approved by the contracting officer. No such fact appears in the instant case. On the contrary, the contracting officer continually objected to the taking out of public liability insurance and plaintiff was so informed of the fact and continued the policy in force or to renew the same after the ruling by the contracting officer. The plaintiff frankly states that in the instant case there was "no such specific individual approval of the policy in this case as there was in the Mason and Hanger case" and adds that plaintiff relies on the approval in the Mason and Hanger case as having been intended as an approval of like action under all similar contracts. We think the approval in the Mason and Hanger case was for the purpose of submitting a question to the comptroller. But however this may be, each of these cases must stand upon its own facts. The contract authorizes insurance approved or required by the contracting officer. In the absence of any such requirement or any such approval or ratification by the contracting officer designated in this contract, the plaintiff can get no benefit from his action under some other contract and with some other contractor. The plaintiff knew almost from the inception of the work that this insurance would not be authorized. If it proceeded to carry this insurance for its own purposes it can not properly expect reimbursement. The petition is accordingly dismissed.

[fol. 18] V. JUDGMENT

At a Court of Claims held in the City of Washington, on the 4th day of May, A. D., 1925, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the defendant, and do order and adjudge that the plaintiff, as aforesaid, is not entitled to recover any sum in this action of and from the United States; and that the petition herein be and hereby is dismissed: And it is further ordered and decreed that the United States shall have and recover of and from the plaintiff as aforesaid, the cost of printing the record herein the sum of One hundred and twenty-seven dollars and ninety-six cents ($127.96), to be collected by the clerk, as provided by law.

By the Court.

VI. PETITION FOR APPEAL—Filed May 12, 1925

From the judgment in the above case decided May 4, 1925, claimant hereby makes application for and gives notice of an appeal to the Supreme Court of the United States.

King & King, Attorneys for Claimant.

VII. Order Allowing Appeal

It is ordered by the court this 12th day of May, 1925, that the plaintiff's application for appeal be and the same is allowed.

[fol. 19] In Court of Claims

[Title omitted]

Clerk's Certificate

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and memorandum by the court; of the judgment of the court; of the plaintiff's application for appeal; of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 19th day of May, A. D., 1925.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of Court of Claims.)

Endorsed on cover: File No. 31,229. Court of Claims. Term No. 506. Fred T. Ley & Co., Inc., appellant, vs. The United States. Filed May 25th, 1925. File No. 31,229.

Supreme Court of the United States.

October Term, 1928.

No. 125.

FRED T. LEY & COMPANY, INCORPORATED,
Appellant,

v.

THE UNITED STATES.

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

GEORGE A. KING,
WILLIAM B. KING,
GEORGE R. SHIELDS,
Attorneys for Appellant.

TABLE OF CONTENTS.

LIST OF CASES CITED.

MISCELLANEOUS REFERENCES.

Supreme Court of the United States.

October Term, 1926.

FRED T. LEY & COMPANY, INCORPORATED, *Appellant*,
v.
THE UNITED STATES.
No. 125.

Appeal from the Court of Claims.
Reported 60 C. Cls. 654.

BRIEF FOR APPELLANT.

Jurisdiction of this Court.

1. The judgment to be reviewed was rendered May 4, 1925, and dismissed the petition of the claimant (record, p. 12).

2. The claim was advanced that on a cost-plus contract for the construction of a cantonment during the World War the cost of a premium on bond of public liability insurance was a part of the cost of the work reimbursable by the Government as was allowed in *Mason & Hanger Company* v. *United States*, 56 C. Cls. 238, Finding V, p. 241, end of opinion foot p. 242, affirmed 260 U. S. 323, 261 U. S. 610, which was also allowed by the Court of Claims in the case of *Bates & Rogers Construction Company* v. *United States*, 51 C. Cls. 392, Finding V, pp. 396, 397.

The contract in this case was identical with the two just named, as well as with those for the other great cantonments (Finding II, at end, record, middle p. 9).

The ruling was that as the taking out of said liability insurance was not specifically approved in this case by the contracting officer, the claimant was not entitled to recover (memorandum opinion, pp. 11, 12).

3. The jurisdiction of this court arises under Judicial Code, Section 242, allowing an appeal to the Supreme Court from judgments of the Court of Claims on behalf of the plaintiff in any case where the amount in controversy exceeds $3,000, and the saving clause of Section 14 of the act of February 13, 1925. Chap. 229, 43 Stat. 936, 942. The act was to take effect three months after its approval but not to affect the right to a review in respect to judgments entered prior to the date when it took effect. This judgment was rendered May 4, 1925, and is therefore within the saving clause.

Statement of the Case.

This suit was brought by Fred T. Ley & Co., Inc., one of the contractors for the sixteen great war cantonments, for the recovery of premiums on public liability insurance as part of the cost of the work. The premiums so paid and for the recovery of which suit was brought amount to $10,190.15.

The contract was identical in form and provisions with the contracts for the fifteen other cantonments all over the United States (Finding II, record, p. 9). The material portions of the contract are printed, record, pp. 4–8. One of these was the contract in the case of *Mason & Hanger Company*, 56 C. Cls. 238, affirmed 260 U. S. 323; 261 U. S. 610. It was also in

the same form as in *Bates & Rogers Construction Co.* v. *United States*, 58 C. Cls. 392, end Finding II, p. 394. Another sample of such contract is given in *United States* v. *Bentley*, 293 Fed. 229, 232–234.

Insurance was taken out against public liability. The actual costs incurred and paid by the contractor amounted to $10,190.15 (Finding VI, record, p. 11). The taking out of this insurance is found to have been disapproved by the contracting officer (Finding III, record, p. 9).

June 28, 1917, a telegram or night message was addressed by the contracting officer to plaintiff and to each of the other fifteen contractors notifying them to obtain insurance against fire and workmen's compensation, and stating that other insurance risks were assumed by the Government and that the Government would not assume responsibility for losses and expenses resulting from the contractor's fault or neglect (Finding IV, record, top p. 10).

August 8, 1917, the contracting quartermaster sent the officer in charge of cantonment construction these policies for public liability insurance.

August 10, 1917, they were returned to the contracting quartermaster disapproved on account of that form of insurance not being authorized.

Further correspondence followed "with the result that the contracting officer declined to approve the taking out of policies covering the same" (Findings IV, V, pp. 10, 11, somewhat abbreviated).

The court found that the evidence fails to show that the public liability insurance taken out by the plaintiff was ever required, approved or ratified by the contracting officer, or by any duly appointed representative of his (Finding VII, record, p. 11).

The petition, Par. V, record (pp. 2, 3), alleges that a certificate of approval of insurance of this same character in the substantially identical case of *Mason & Hanger Company*, contractors for the construction of Camp Zachary Taylor, Kentucky, was intended as a general approval of all such public liability insurance, and was made with the object of submitting the question to the Comptroller of the Treasury; that it was in effect a ratification and approval of the taking out of such insurance in this case, and but for the action of the Comptroller in declining to sanction payment of such expense the contracting officer would have formally approved and paid such costs.

It is found by the Court of Claims, Finding II, p. 9, that this contract was one of sixteen for cantonments throughout the country. One was that of the Mason & Hanger Company for Camp Zachary Taylor, Kentucky. Another was with the Bates & Rogers Construction Company for the construction of Camp Grant, Illinois.

June 28, 1917, a telegram or night message was addressed by the contracting officer to all sixteen of these contractors, thus showing that identical action was intended to be taken in all of them.

The Court of Claims entered judgment dismissing the petition (memorandum opinion, pp. 11, 12; judgment, p. 12). This judgment was entered May 4, 1925, and the case is reported 60 C. Cls. 654. An appeal was duly taken to this court.

Assignment of Error.

The appellant assigns the following error in the opinion and judgment of the Court of Claims:

That said court failed to hold that the premium on liability insurance policies paid by the contractor who

is appellant in this case was a proper part of the cost of the work under a cost-plus contract and reimbursable to the contractor, and failed to give judgment for the amount of said premium, amounting to $10,190.15, and dismissed the petition, whereas the Court of Claims should have given judgment for the cost of public liability insurance amounting to $10,190.15.

BRIEF OF ARGUMENT.

The Question Involved.

Sixteen contracts were made for great Army cantonments in various parts of the United States for housing the soldiers, enlisted or drafted for the World War. The cost of these cantonments ranged from $8,000,000 to $12,000,000. A list of the sixteen with the names of the contractors and the cost of each contract is given in Hearings on the Army Appropriation Bill for 1919, Vol. 1, pp. 895–900, 65th Congress, 2d Session.

The scheme of these contracts was that the Government should pay the cost of all elements entering into construction, with a percentage of profit which was in no event to exceed $250,000. One of the items defined as part of the cost of the work was "Such bonds, fire, liability and other insurance as the contracting officer may approve or require."

The question whether insurance against public liability was a necessary part of the cost of the work came up at a very early date.

In the case of *Mason & Hanger Company*, contractors for Camp Zachary Taylor, Kentucky, the question of public liability insurance was submitted to the Comptroller as follows:

"Major Dempsey, who on July 16, 1917, had ceased to be the contracting officer on July 17, 1917, refused to approve the payment of premiums on these policies; but upon full payment of these premiums a voucher for the same was submitted by the plaintiff to the constructing quartermaster at the place of construction and by him transmitted to the War Department. On December 22, 1917, Col. I. W. Littell, the contracting officer, approved the action of the plaintiff in taking out the policies of insurance above referred to and authorized and directed the constructing quartermaster to pay to the plaintiff the sum of $9,114.52, the amount of the premiums paid by it on said policies. The said quartermaster submitted the question of payment of the aforesaid amount to the Comptroller of the Treasury, who decided that the said amount should not be paid to the plaintiff, and said amount has not been paid by the United States to the plaintiff." (56 C. Cls. 238, Finding V, p. 241.)

These items were included in the judgment in favor of Mason & Hanger Company (p. 242).

The case came to this court. No error was assigned on the allowance of these items of public liability insurance but only on the premium on the bond for faithful performance. The judgment was affirmed 260 U. S. 323; 261 U. S. 610.

The next case before the Court of Claims was that of *Bates & Rogers Construction Company*, contractors for Camp Grant, Illinois, 58 C. Cls. 392.

They took out public liability insurance of precisely similar character. Finding V in that case (pp. 396, 397) constitutes a finding of the general facts in regard to all these cantonment contracts:

"Acting under instructions of the constructing quartermaster, who was the representative on the work of the contracting officer, the plaintiff took out policies of public liability insurance and paid premiums thereon

to the insurance companies amounting to the sum of $11,764.59, the rates of which insurance had been fixed by agreement between the insurance companies and the contracting quartermaster, representative on the work of the contracting officer, which rates were substantially less than the usual and customary rates of such insurance. Major Dempsey, who on July 16, 1917, had ceased to be the contracting officer, on July 19 through a subordinate officer refused to approve policies of insurance that had been submitted including public liability. The plaintiff protested that the liability insurance had been taken out under instructions of the representatives of the contracting officer; that such insurance was necessary alike for the protection of the Government and the contractor; and that such insurance could not safely be dispensed with. The disapproval of the above-named officer extended not alone to the liability insurance taken out by the plaintiff but to that taken out by other cantonment contractors. On December 22, 1917, Col. I. W. Littell, contracting officer, approved the action of the contractor for cantonment at Camp Taylor in taking out policies of liability insurance and authorized and directed the representative, the constructing quartermaster, to reimburse that contractor for the cost of premiums on such insurance. The construction quartermaster submitted the question of payment of cost of such insurance to the comptroller of the Treasury, who decided that the amount paid for insurance should not be reimbursed to the contractor there involved. This decision was taken as extending to like expenditures made by other contractors, including the plaintiff, by both Colonel Littell, who was then contracting officer, and General Marshall, his successor. The contracting officer, as above stated, approved the cost of liability insurance under another contract as a proper part of the reimbursable cost of the work, and on March 26, 1918, in submitting the case of another contractor to the Auditor for payment decided that the cost of premiums upon public liability insurance was a legitimate part of the cost of work under 'the contract for

emergency work,' and in letter of December 30, 1919, the contracting officer stated that he had refused to approve claims of other contractors similar to the Mason & Hanger Co. claim only because of the action of the Comptroller in that case and that there was no difference between the claim of the plaintiff company and that of the Mason & Hanger Co. The plaintiff made a total expenditure of $11,764.59 on account of cost of public liability insurance, for no part of which has it been reimbursed by the United States."

It was agreed by the United States and the claimant in the Court of Claims that that case was to be governed by the *Mason & Hanger* case (Finding VI, 58 C. Cls. 397). Judgment was rendered accordingly in favor of the contractors in that case for the premiums on public liability insurance. From that judgment no appeal was taken.

This case does not differ in principle from the *Mason & Hanger* case. It does not differ even in the smallest detail from the *Bates & Rogers* case.

This is practically admitted in the Memorandum Opinion in this case where it is said (record, p. 12) "that plaintiff relies on the approval in the *Mason and Hanger* case as having been intended as an approval of like action under all similar contracts. We think the approval in the *Mason and Hanger* case was for the purpose of submitting a question to the comptroller."

The question is whether a mere difference in the form of finding the nature of the action of the War Department in those cases and in this shall make a difference where the nature of the items is identical in every particular. There were sixteen of these contracts for great cantonments. It would be a singular result that when the action of the officers of the United States in regard to all of the sixteen contracts was

identical, a mere difference in the form of finding that action should allow the amount of these premiums for public liability insurance to two of the contractors and deny it to a third. No such intent appears on the part of the War Department. The amount having been allowed to two previous contractors should similarly be allowed to this one.

Intent of the Contract.

The material provisions of the contract are as follows:

"*Article II. Cost of the Work.*—The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer and as are included in the following items:

* * * * * * * * *

"(h) Such bonds, fire, liability and other insurance as the contracting officer may approve or require; and such losses and expenses, not compensated by insurance or otherwise, as are found and certified by the contracting officer to have been actually sustained (including settlements made with the written consent and approval of the contracting officer) by the contractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the contractor.

"*Article III. Determination of Fee.*—As full compensation for the services of the contractor, including profit and all general overhead expense, except as herein specifically provided, the contracting officer shall pay to the contractor in the manner hereinafter prescribed a fee to be determined at the time of completion of the work from the following schedule, except as hereinafter otherwise provided:

* * * * * * * * *

"The total fee to the contractor hereunder shall in no event exceed the sum of $250,000, anything in this agreement to the contrary notwithstanding.

"*Article VI. Special requirements.*—The contractor hereby agrees that it will:

* * * * * * * * *

"(c) Procure, and thereafter maintain such insurance, in such forms and in such amounts, and for such periods of time as the contracting officer may approve or require.

* * * * * * * * *

"*Article XIV. Settliment of disputes.*—This contract shall be interpreted as a whole and the intent of the whole instrument, rather than the interpretation of any special clause, shall govern." (Record, pp. 5–8.)

The words "liability and other insurance" are certainly broad enough to include policies of insurance against liability of the contractor for accidents to the public.

It is true that the contractor was first notified June 28, 1917, "that the Government would not assume responsibility for losses and expenses resulting from the contractor's fault or neglect" (Finding IV, p. 10). This position was subsequently receded from, as is made clear by the findings of fact in the *Mason & Hanger* and *Bates & Rogers* cases, quoted, *ante*, pp. 6–8.

Premiums on Public Liability Insurance.

Premiums on policies of insurance of contractors against liability for damages to the public were clearly within both the letter and spirit of the contract. It is true that such injuries usually arise out of the fault or neglect of some one employed by the contractor and that the negligence of that employee is attributable by a rule of law to the contractor.

The question whether premiums of this kind are covered by a cost-plus contract arose in *United States* v. *Standard Oil Company*, 258 Fed. 697, affirmed 264 Fed. 66. The question there was whether the contractor or the subcontractor should bear the damage occasioned by a marine disaster. The Raymond Concrete Pile Company agreed with the Standard Oil Company to construct a concrete pier, and was to receive as compensation 12½ per cent of the cost of the work, not exceeding $20,000. The Standard Oil Company was to pay all of the cost of the work, cost being defined to include among other items "the cost of insurance and any expense incurred in connection with any accident or damage to person or property" (264 Fed. foot p. 67).

Both the District Court and the Circuit Court of Appeals held that damages due to accident, even though arising from the fault of some agent or employee of the cost-plus contractor, were a part of the cost of the work, whether the liability was covered by insurance or not.

The District Court, 258 Fed. 701, 702, said:

"An analysis of the agreement shows that the Standard hired the experience, skill, and general executive organization of the Raymond, to organize, direct, and oversee, subject to the instructions of the Standard, the doing of the work for which the Standard was to pay. The Raymond was to receive 12½ per cent on the cost of the work, with a provision that its fee should not exceed $20,000. In return the Raymond was to furnish, at its New York offices, the services of its executive officers. For practically everything else the Standard was to pay. Some specified heavy tools and machinery were to be hired from the Raymond at a per diem rental. The other costs to be borne by the Standard were enumerated in great detail. In short, as the contract itself declares, the Raymond was employed to do the work as the agent of the Standard, and at the

latter's charge. The cost of insurance and other expenses incurred in connection with any accident or damage to person or property was expressly mentioned among the things for which the Standard was to pay, and the same point was further emphasized by the declaration of the Raymond, in its letter confirming the acceptance of the contract:

"'That any expense incurred in connection with any accident or damage done upon person or property, not covered by insurance shall be considered a part of the cost of the work, but no fee shall be paid to the contractor on this cost.'

"It is easy to conceive of accidents which are not the result of the negligence of any one, but after all they are few as compared with the number of those which happen because some one has done that which he ought not to have done, or has left undone that which he ought to have done.

"The parties to this contract were aware that it was highly probable that in the doing of the work there would be accidents, damaging life, limb, or estate. They knew that most of them would be the result of carelessness of some one employed by the Raymond. There could have been no question that, if the work was to be done at reasonable cost, the Raymond would have to use every-day people of about the average of care and skill, and that some of them, at some time or other, would be careless, and once in a while would hurt somebody or something. The damage thus done, no matter who paid for it, would be as much a part of the cost of the work as were the sums paid for labor, fuel, or tools. The undertaking by the Standard to assume liability for such damage was of a piece with the whole scheme of the bargain it was making."

The Circuit Court of Appeals, Fourth Circuit, affirming the judgment said (*Standard Oil Co.* v. *United States*, 264 Fed. 66, 69, 70):

"It is true as a general rule that no one can rid himself in advance of the obligation to use due care imposed

by law or assumed by contract. So here the Raymond Company can not escape its liability to the libelants by referring them to the contract with the Oil Company. But the rule does not extend to denial of the right of one about to undertake work requiring the use of fire and dangerous machinery to contract with an insurance company, or the other party to the contract for the work, for indemnity against losses from the negligence of its employees. In modern conception such losses are as certain in the long run as the expenditures for material, labor, interest on money, insurance, and delay from weather conditions or strikes. Every person who undertakes such work either for himself or as independent contractor or as a responsible agent estimates this factor of cost as an item of business risk. In this instance the contract was by the Raymond Company as agent of the Oil Company to plan and superintend the work, to hire and direct the laborers. The Oil Company assumed all other costs and liabilities incurred in the course of the enterprise. There is no reason why the factor of liability for accidents should not be placed by agreement on the Oil Company's side of the contract. This assumption of liability by the Oil Company of the items of outlay for accidents due to occasional acts of negligence to be expected of the servants employed on the work was no more unreasonable or against public policy than the assumption of the other expenses of the work which the Raymond Company might see fit to incur. As to these matters the obligation assumed by the Oil Company was subject to the implied duty of the Raymond Company of due effort to keep the costs within reasonable bounds, and to use due diligence to obtain competent servants and supervise the work with due care. Intentional or reckless disregard of either duty would have been ground of relief to the Oil Company on the ground of breach of the contract. But there was no other limitation to the promise of the defendant to pay the costs and damages incident to the enterprise. These conclusions are in accord with *Westinghouse, Church, Kerr & Co.* v. *Long Island Railroad Co.*, 160 App. Div. 200;

145 N. Y. Supp. 201, affirmed 216 N. Y. 697; 110 N. E. 1051. We find no other case directly in point."

On a rehearing, 266 Fed. 690, it was held that such accidents were a part of the cost of the work, whether covered by insurance or not.

In *Westinghouse* v. *Long Island Railroad Company*, *supra*, the court said (160 N. Y. App. Div. 200, affirmed 216 N. Y. 697):

"The contract was (so far as the construction part is concerned) what is known as a 'percentage' contract, by which the contractor supplies labor and material at cost and receives as his compensation a fixed percentage thereon in lieu of other profit. The plainly-expressed intent and meaning of the parties was that, excluding its overhead expenses, plaintiff was to be reimbursed for all cost and expense incurred in the performance of the work. On the face of the contract it is apparent that it involved a work of considerable magnitude, and required the employment of many artisans and laborers, and that in the distribution of the forces employed plaintiff would necessarily be compelled to rely on the skill and prudence of many for whose negligence plaintiff would be responsible. In a work of this description accidents are certain to occur; so certain in fact that the law of averages permits them to be made the subject of insurance and to be covered by policies issued by corporations organized by virtue of general laws and doing business under State inspection. The cost of such accidents, direct and indirect, including the expense of compensating the injured and of investigating and defending claims, is an incident of the work and a necessary part of its total cost."

"Workmen's compensation insurance," which does not differ in principle from insurance against liability to the public here involved, was expressly approved under this contract (Finding IV, record, near top p. 10).

In *Lovell* v. *United States*, 46 C. Cls. 318, 342; 47 C. Cls. 361, 371, it was held that where work "was to be paid for at actual necessary cost" such costs "included the liability insurance of men."

The decision of the Comptroller of the Treasury in 1915, in *Scott's* case (22 Comp. Dec. 261, 262) held that under a cost-plus contract the actual cost of liability insurance carried by a contractor as a protection against accidents is a part of the actual cost of labor and must be allowed accordingly.

In *Arizona Employers' Liability* cases, 250 U. S. 400, this court recognized that the damage caused by accidents was a part of the cost of the work.

The court said, in the opinion by Mr. Justice Pitney (p. 422), that the employer has an opportunity "to charge the loss as a part of the cost of the product of the industry."

Again (p. 424):

"The act—assuming, as we must, that it be justly administered—adds no new burden of cost to industry, although it does bring to light a burden that previously existed but perhaps was unrecognized, by requiring that its costs be taken into the reckoning. The burden is due to the hazardous nature of the industry, and is inevitable if the work of the world is to go forward."

Insurance against liability for accidents to the public is equally a legitimate part of the cost of the work.

It has already been allowed under two similar contracts. Unless some technical rule of law requires this court to shut its eyes to facts conceded and published in official reports it should be allowed here.

Advantage of Insurance to the United States.

By the Report of the Assistant Attorney General, in Charge of the Defense of Suits against the United

States in the Court of Claims, it appears (Annual Report of Attorney General, 1920, pp. 57, 58; same for 1921, p. 41):

"Many of these involve the supervision of the defense of suits brought against Government contractors growing out of the execution of cost-plus contracts, wherein the United States has agreed to indemnify the contractor for all expenses and losses sustained in the execution of the contract. As a judgment against a contractor in this character of litigation may result in additional cost being charged against the contract, to be paid by the Government, it becomes the duty of this department to either defend such suits or to assist counsel for the contractors in the preparation of their defense."

Insurance policies of this kind take all the burden of defense of such suits off the United States as well as off the contractor. It is therefore a decided advantage to the United States to get the benefit of such insurance policies and to be thereby protected from just such suits as are here referred to.

Reference to General Findings in Cases.

We have deemed ourselves at liberty to ask the attention of the court to the findings in the two cases of *Mason & Hanger Company* which reached this court and *Bates & Rogers Construction Company* which did not reach this court. These findings are of a general character and relate to the whole series of sixteen cantonment contracts. Their truth was conceded by the Government in the *Bates & Rogers* case, Finding VI, memorandum opinion, 58 C. Cls. 391, 392.

They come within the rule in *Reading Steel Casting Company* v. *United States*, 268 U. S. 186, 188:

"The facts admitted and the concessions made by the parties may be considered with the findings of fact made by the district court."

In *Ceballos* v. *United States*, 214 U. S. 47, the court in construing a contract gave determinative effect to the construction placed upon a previous contract not found by the Court of Claims, and printed only in one of the briefs, but which was admittedly a correct copy (pp. 49–52).

In *New York Indians* v. *United States*, 170 U. S. 1, 32, this court was asked to take into consideration documents bearing on the claim of those Indians. The court said (p. 32):

"It is insisted by the Attorney General that, as these documents are not referred to in the findings of fact by the court below, this court can not consider them; but as they are documents of which we may take judicial notice, we think the fact that they are not incorporated in the findings of the court will not preclude us from examining them, with a view of inquiring whether they have the bearing claimed. *Jones* v. *United States*, 137 U. S. 202, 214.

"While it is ordinarily true that this court takes notice of only such facts as are found by the court below, it may take notice of matters of common observation, of statutes, records or public documents, which were not called to its attention, or other similar matters of judicial cognizance."

Equally, are the general facts found by the Court of Claims in the *Bates & Rogers* case and there conceded by the Government as to all sixteen of the cantonment contracts to be considered here as a concession made by the Government in an exactly similar case and a finding of fact based upon that concession.

This fact should be considered with those embodied

in the findings, in order to prevent a failure of justice. Otherwise items allowed to two of sixteen cantonment contractors will be denied under precisely similar circumstances to a third.

Conclusion.

The judgment should be reversed and the case remanded to the Court of Claims for further proceedings.

GEORGE A. KING,
WILLIAM B. KING,
GEORGE R. SHIELDS,
Attorneys for Appellant.

INDEX

AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 125

FRED T. LEY & COMPANY, APPELLANT

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION

The memorandum opinion below (R. 11, 12) is reported in 60 Ct. Cls. 654.

JURISDICTION

The judgment was entered on May 4, 1925 (R. 12) and the petition for appeal was filed on May 12, 1925 (R. 12). The jurisdiction of this Court is invoked under Sections 242 and 243 of the Judicial Code as they stood prior to the time the Act of February 13, 1925 (chap. 229, 43 Stat. 936) became effective.

THE QUESTION

There was a cost-plus contract for the construction of cantonment buildings which provided that the contractor should be reimbursed for such bonds and insurance as the contracting officer approved or required. Can the contractor in such a case recover the cost of public liability insurance where the contracting officer never approved, required, or authorized the same, but consistently declined to approve same?

STATEMENT

The appellant made a contract with the Government for the construction on a cost-plus basis of certain cantonment buildings at Camp Devens, Massachusetts. (R. 9.) The contract provided that the appellant should be reimbursed (R. 5, 6)—

> for such of its actual net expenditures in the performance of said work as may be approved or ratified by the Contracting Officer and as are included in the following items:
>
> * * * * *
>
> (h) Such bonds, fire, liability and other insurance as the Contracting Officer may approve or require; and such losses and expenses, not compensated by insurance or otherwise, * * * found * * * to have clearly resulted from causes other than the fault or neglect of the contractor * * *.

This left the contractor to bear cost of insurance against losses resulting from his own fault, unless

the Contracting Officer saw fit to authorize the insurance as part of the cost of the work.

It also provided that "Contracting Officer" should mean his successor in office, or any person to whom such duties were assigned by the Secretary of War, and any duly appointed representative of the contracting officer. (R. 8.) The contract was dated June 14, 1917. (R. 9.) After entering upon the work appellant took out a policy of insurance covering public liability insurance. On June 23, 1917, the officer in charge of cantonment construction informed appellant that it should carry such insurance as the contracting officer might direct and that the Government would carry its own risk against fire and public liability damage. The contracting officer disapproved the action of appellant in taking out the liability insurance, and notified appellant that he did not consider the cost of same a proper item of the work. (R. 9.) On June 28, 1917, the contracting officer sent to appellant and to each of the other fifteen contractors engaged in cantonment construction, a telegram advising them to obtain insurance protecting material against fire between the time of delivery by the carrier and acceptance by the Government, and also recommending compensation insurance as required by the statutes, but stating that other insurance risks were assumed by the Government. (R. 10.)

Several communications passed between the appellant and the representatives of the Government,

but in no instance did these insurance policies here in question receive the approval of the contracting officer. The constructing quartermaster at the Camp sent several policies taken out by appellant to the officer in charge of cantonment construction, who returned the same, disapproved, as not being a form of insurance that was authorized. This disapproval was communicated to appellant. (R. 10.)

Other communications by appellant followed. "The Government officers adhered to their decision." (R. 10.) Appellant then claimed that the policy had been authorized by the constructing quartermaster. (R. 10.) The officer in charge of cantonment construction advised appellant that the telegram had prohibited such policies, and he could not understand why they had not been canceled, in spite of the claimed authorization of the constructing quartermaster. (R. 11.) The Court of Claims also found as follows (R. 11):

> A number of communications passed between the parties on the same general subject of public liability insurance, with the result that the contracting officer declined to approve the taking out of policies covering the same.
>
> * * * * *
>
> The evidence fails to show that the public liability insurance taken out by the plaintiff (appellant) was ever required, approved, or ratified by the defendant's (appellee's) contracting officer or his successor in office or

any other person to whom the duties of the contracting officer were assigned by the Secretary of War, or by any duly appointed representative of the contracting officer.

In these circumstances the Court of Claims dismissed the petition, holding that the insurance was never authorized, and there was no obligation upon the part of the Government to pay the premiums therefor.

SUMMARY OF ARGUMENT

The contract provided that insurance premiums should be considered a part of the cost only when the contracting officer authorized or approved such insurance. The Court has found as a fact that the evidence fails to show that such insurance was ever required, approved, or ratified by the contracting officer; therefore appellant can not recover.

ARGUMENT

This case is wholly without merit and the appellant's argument is based on a statement of facts abounding in inaccuracy and in part flatly contradicted by the record. The suit was to recover the premiums paid by appellant for public liability insurance. The appellant had a contract with the Government to construct certain buildings at Camp Devens, Massachusetts. The contract provided that the Government should pay to appellant such actual net expenditures as might be approved or ratified by the contracting officer and as were included in certain items enumerated in such contract,

among which items were "such bonds, fire, liability and other insurance as the Contracting Officer may approve or require * * *." (R. 5, 6.) The Court of Claims has found specifically that procuring public liability insurance was never authorized or approved and was specifically disapproved by the contracting officer. That is all there is to the case, and further argument would be a mere repetition of the statement of facts.

The appellant contends that this case is exactly like two other cases in which the contractor recovered bond and insurance premiums, and that therefore appellant in this case should recover. The two other cases referred to were decided upon the facts found by the court in such cases, which facts are different from those found in the case at bar, and the findings in the case at bar preclude any recovery. This case must be decided on the findings in it and not on the record in some other case.

The appellant refers to the case of *Mason and Hanger* (56 Ct. Cls. 238; 260 U. S. 323). The only question there decided by this Court is that the bond premiums were a proper part of the cost. The Court of Claims did hold that insurance premiums should also be allowed, but the facts in that case specifically show that the contracting officer approved that insurance. (See 56 Ct. Cls. 238, 241.) In the case at bar the court found that the contracting officer refused to approve it. The appellant also refers to the case of *Bates and Rogers*

Construction Co. v. *United States* (58 Ct. Cls. 392). The record in that case shows that the court considered that the contracting officer approved the insurance, and the findings disclose that the contracting officer approved the insurance in the *Mason and Hanger case*, and that the Government stipulated in the *Bates and Rogers case* that the further disposition of the *Bates and Rogers case* should in all respects be governed by the decision in the *Mason and Hanger case* (58 Ct. Cls. 392, 396, 397). Therefore the findings in these cases are different from the findings in the case at bar. The Court of Claims found that the form of the contracts was the same in the case at bar as in the other cantonment cases, but certainly did not find that the proceedings thereafter were at all alike; and specifically found that the contracting officer declined to approve this insurance.

The judgment of the Court of Claims should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

HERMAN J. GALLOWAY,
Assistant Attorney General.

JANUARY, 1927.

O

SUPREME COURT OF THE UNITED STATES.

No. 125.—October Term, 1926.

Fred T. Ley Company, Inc., Appellant, *vs.* United States. } Appeal from the Court of Claims.

[February 21, 1927.]

Mr. Justice Stone delivered the opinion of the Court.

Appellant entered into a contract with the government for the construction of certain army cantonment buildings at Camp Devens, Massachusetts, upon a cost-plus basis. The contract provided for the reimbursement of the contractor for all expenditures made in performance of the contract, including the cost of "such bonds, fire, liability and other insurance as the Contracting Officer [might] approve or require; . . ." Appellant brought suit in the Court of Claims to recover the cost of public liability insurance effected by it in connection with the performance of its contract. That court found that the evidence failed to show that the liability insurance in question was ever required or approved by the contracting officer of the government or any person representing him or performing his duties, and gave judgment for the government. 60 Ct. Cls. 654.

On appeal to this Court, Jud. Code, §§ 242 and 243, before the amendment of 1925, appellant seeks to avoid the effect of this finding by pointing out that all the contracts for the construction of army cantonments during the late war were identical in form and that recovery has been allowed for the cost of public liability insurance in connection with the construction of Camp Zachary Taylor, Kentucky, in *Mason & Hanger Co.* v. *United States,* 56 Ct. Cls. 238; affirmed, 260 U. S. 323; and of Camp Grant, Illinois, in *Bates & Rogers Const. Co.* v. *United States,* 58 Ct. Cls. 392. It is urged that the records in those cases show a blanket approval by the government of the expenditures made for liability insurance in the construction of all the army cantonments. But the Court of Claims

specifically found that there was no evidence that the present expenditure was required or approved. By that finding we are concluded. *Luckenbach Steamship Co.* v. *United States,* 272 U. S. —; *Rogers* v. *United States,* 270 U. S. 154, 162. Moreover in *Mason & Hanger* v. *United States, supra,* the court's finding was that the contracting officer had merely approved the particular insurance involved in that suit. In *Bates & Rogers Const. Co.* v. *United States, supra,* the court based its decision upon a stipulation that the case should be controlled by the decision of this Court in the *Mason* case. No substantial question is presented by the appeal.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.